UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 19

NIPPON DYNAWAVE PACKAGING CO.

and **Case-19-CA-194956**

ASSOCIATION OF WESTERN PULP AND PAPER WORKERS

RESPONDENT'S BRIEF ON THE MERITS

INTRODUCTION

Nearly forty (40) years later, the General Counsel continues to ignore or misapply the mandates of *Detroit Edison v. NLRB*,440 U.S. 301 (1979) that "A union's bare assertion that it needs information does not automatically oblige the employer to supply **all the information in the manner requested**." (Id. at 314) (emphasis added); and "The duty to supply information under Section 8(a)(5) turns upon "the circumstances **of the particular case**", *NLRB v. Truitt Mfg. Co.,* 351 U.S. 149, 153 (1956) (Id.)(emphasis added). Also, contrary to *Detroit Edison* and the Board's decision in *Columbia Products Co*. 259 NLRB 220, n.1 (1981), the General Counsel applies a *per se* rule that if the information sought is arguably relevant it must be supplied. But that is not the law, "the rule is not *per se*, and in each case the Board must determine whether the requested information is relevant, and if relevant, whether it is sufficiently important or needed to invoke a statutory obligation of the other party to produce it." *Columbia Products,* Id.

While the General Counsel may feel free to ignore the Supreme Court and Board precedent, the Administrative Law Judge may not.

Rather than examine the particular circumstances of this case, the General Counsel applies a *per se* presumption that Respondent was obliged to provide all of the requested information based solely on the Union's bare assertion, which in turn was based upon a contrived and fabricated controversy. Moreover, the General Counsel utterly failed to consider Respondent's reasonable alternatives proposed to the Union in lieu of the Union's blanket request.

In this case, based upon the reports of **only two** (out of hundreds) employees of alleged incorrect Health Savings Account contributions, the Union contrived and concocted a unit wide problem ("Like so many other issues it is probably bigger than those two guys and folks just didn't notice" Ex.I) **that never existed.** In fact "those two guys" were the **two and only two employees** who ever raised an issue with their individual HSA accounts. Not to be deterred by the facts, based upon the fabricated unit wide problem, Local President Lovgren requested complete HSA information for all of his members so he could compare it to his membership list. Respondent immediately responded and contended that the request was overbroad ("far reaching") and would violate the privacy interests of the employees and Company policy. More significantly, Respondent offered to address any HSA concerns on an employee by employee basis. True to its word, Respondent addressed and resolved **the only two inquiries it or the Union ever received.**

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FACTUAL SUMMARY

This matter is being submitted on a stipulated record so a complete recitation of the facts is not necessary. Rather Respondent submits this summary of the facts.

The relevant collective bargaining agreements provide for, based on individual elections, Health Savings Account deposits ranging from $0.00 (individual elects not to participate) to $400 (family). These elections and deposits **are not processed locally** by Respondent but rather the transactions take place directly between the employee, Respondent's payroll provider and health provider (Ex. H). In other words, Respondent is only responsible for supplying the necessary funds based upon the employee elections, it plays no other role in the deposits.

On January 30, 2017, the Local President Lovgren inquired why the **employee** HSA contributions ("our money from the January 20 paycheck") had not been deposited and claimed that people were losing "investment opportunities" (Ex. H). Later that morning Lovgren again referred to **employee** contributions and alleged that someone was "embezzling the interest **off our money taken out for the HSA and 401k"**. (Ex. H). In both cases, Respondent replied immediately ("David, Thank you for following up."), reminded the Union President that the transactions were not handled locally ("It's a transaction that takes place between Premera and Ultimate directly") and agreed to look into it (Id.).

On February 17, 2017 the Local Union President emailed Respondent saying "I talked to David Kolbo last night during bowling and he said he never got the $400 HSA contribution…**are there other new hires that did not get it? Can you check into this…?** The Company did in fact check into Kolbo's situation and was informed by the health provider that Kolbo had failed to elect to participate (Ex. M). On that same day, the Local President was informed that employee

Hendrickson had received only a $200 rather than a $400 deposit. Lovgren informed Respondent of the situation on February 20, 2017. Like Kolbo, Respondent investigated and resolved Hendrickson's issue (Ex. L).

No other complaints, concerns or questions regarding Company contributions to the HSA accounts were ever addressed to Respondent.

DISCUSSION

This case is much ado about nothing. Frankly, if the General Counsel and Region had done their jobs and analyzed the particular facts of this case, we would not be here. Instead, they apparently concluded that the requested information **might be** relevant to some dispute, threw up their hands, and applied a prohibited *per se* rule that Respondent was obliged to provide all of the information in the form requested by the Union. Under *Detroit Edison*, that is not the law.

The HSA contributions are not a run of the mill contractual benefit. It is a completely optional benefit which is not tied in any way to an employee's right to health insurance. The contributions are based upon an individual by individual employee election. An employee may elect not to participate based upon his or her own circumstances. Those elections are private and the Union has no legitimate interest in them. It was the individual elections that Respondent felt obligated to protect and there is no evidence that this concern was made in bad faith. It is also certainly true that an employee's contributions to his or her own account are private matters.

Moreover, Respondent is only a party to the contribution deposits to the extent that it provides the funds. There is no evidence that Respondent ever failed to provide adequate funds for the contributions. If there were clerical errors, such as Hendrickson, Respondent was not involved or responsible.

It also bears noting that the requested information is irrelevant or necessary to any legitimate controversy espoused by the Union: the alleged embezzlement of the interest from **employee** contributions to the **employee's** HSA or 401k?; the alleged loss of "investment opportunities" on **employee contributions**?; new hires? Indeed, the Union President Lovgren told Union Officer Sauters that he wanted the information **to compare to the Union's membership list** (Ex. I). To what end? The only person who would know whether the information accurately reflected his or her individual election would be the individual employee. To be of value, the Union would have to survey each individual employee. That is essentially what Respondent offered when it indicated it would release the information upon receipt of releases. Thus, the requested information was, for any legitimate purpose, useless.

It also bears emphasis that the "need" for unit wide information was contrived and fabricated and existed only in the minds of the Union President Lovgren and Sauters. The Union only received two inquiries. Rather than address issues if and when they arose, **as the Company repeatedly offered and did**, the Union chose to extrapolate the two inquiries into a membership wide problem, which did not exist. The General Counsel's claim that it was "incumbent upon the union to [request union wide information] in order to enforce its statutory obligations" is as farcical as the Union's fabricated controversy. Certainly, it cannot be gainsaid that it is the National Labor policy for officious Union officials to fabricate unit wide

problems where none exist and then, aided and abetted by the Board, reject all offers of reasonable compromise.

Finally, Respondent asks the Administrative Law Judge to focus solely on the particular circumstances of this case as required by *Detroit Edison.* Specifically, the Administrative Law Judge should focus on the limited nature of the actual "dispute", the reasonableness of Respondent's repeated offers to address the "controversy" on a case by case basis, and the facts that Respondent did address and resolve the only two issues ever raised.

Dated this 25th day of October, 2017
s/Richard N. VanCleave
Attorney for Respondent

CERTIFICATE OF SERVICE

I certify that I served an electronic copy of Respondent's Brief on

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Dated this 25nd day of October, 2017

s/ Richard N. VanCleave
Attorney for Respondent